

U.S. SMALL BUSINESS ADMINISTRATION  
WASHINGTON, DC 20416

January 5, 2012

**Via Facsimile**

Pedro Briones, Esq.  
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U.S. Government Accountability Office  
Washington, DC 20548  
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**RE: Response to Protest of FitNet Purchasing Alliance, B-406075**

Dear Mr. Briones:

Thank you for the opportunity to permit the U.S. Small Business Administration (SBA) to submit a response to the U.S. Government Accountability Office (GAO) concerning a protest filed by FitNet Purchasing (FitNet) on October 26, 2011. FitNet's protest relates to Solicitation No. W911RZ-12-T-0001, issued by the Mission and Installation Contracting Command, Fort Carson, CO (MICC).

According to the documents presented, the MICC posted the solicitation as a reverse auction buy on FedBid. FedBid's® website explains that **it** is an online procurement service, available at [www.FedBid.com](http://www.FedBid.com). See [www.FedBid.com](http://www.FedBid.com). MICC did not utilize the U.S. General Services Administration's (GSA's) e-Business innovation, *eBuy*, which "is GSA's electronic Request for Quote (RFQ)/Request for Proposal (RFP) system designed to allow government buyers to request information, find sources, and prepare RFQs/RFPs, online, for millions of services and products offered through GSA's Multiple Award Schedule (MAS) and GSA Technology Contracts." See <https://www.ebuy.gsa.gov/advantage/ebuy/start.page.do>. Despite the fact GSA's *eBuy* was not used, the solicitation sought only GSA Schedule bids; in other words, all bidders were required to have the items on an existing GSA Schedule in either the bidder's name or as an agent for a GSA Schedule holder.

The solicitation sought nine brand name or equal Dual Cable Cross Machines. The independent government estimate for the requirement was approximately \$32,000. MICC did not set-aside the solicitation for small businesses, despite the fact its market research evidenced that small businesses would provide the products.

In its protest, FitNet argues that the requirement should have been set-aside for small businesses. Specifically, FitNet argues that MICC was to have considered the statutory requirement that acquisitions with an estimated value below the simplified acquisition threshold "shall" be set-aside for small businesses. FitNet further argues that GAO's prior ruling in *Aldevra* is applicable to its protest. FitNet believes that the use of FedBid and the reverse auction, as well as the requirement that the bidder have a GSA Schedule or be an agent for a

Schedule holder, circumvents the statutory small business set-aside mandate. As a result, FitNet requests that MICC cancel its FedBid acquisition and follow statutory mandate by setting-aside the requirement for small businesses.

The SBA concurs with FitNet's arguments for the following reasons.

The Small Business Act states the following with respect to proposed acquisitions valued below the simplified acquisition threshold:

(j) Small business reservation

(I) Each contract for the purchase of goods and services that has an anticipated value greater than \$2,500 but not greater than \$100,000<sup>1</sup> **shall be reserved exclusively for small business concerns** unless the contracting officer is unable to obtain offers from two or more small business concerns that are competitive with market prices and are competitive with regard to the quality and delivery of the goods or services being purchased.

(2) In carrying out paragraph (1), a contracting officer shall consider a responsive offer timely received from an eligible small business offeror.

(3) Nothing in paragraph (I) shall be construed as precluding an award of a contract with a value not greater than \$100,000 under the authority of subsection (a) of section 637 of this title, section 2323 of Title 10, section 712 of the Business Opportunity Development Reform Act of 1988 (Public Law 100-656; 15 U.S.C. 644 note), or section 7102 of the Federal Acquisition Streamlining Act of 1994.

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<sup>1</sup> The Small Business Act states that small business set asides are mandatory for the acquisition of supplies and services valued from \$2,500 to \$100,000. 15 U.S.C. § 6440(1). However, 41 U.S.C. § 431a(a)(1) states that the "Federal Acquisition Regulatory [FAR] Council shall adjust each acquisition-related dollar threshold provided by law, as described in subsection (c) of this section, to the baseline constant dollar value of that threshold." The FAR Council has implemented such inflationary adjustments. As a result of 41 U.S.C. § 431a and the final rule, the FAR now states:

(a) Before setting aside an acquisition under this paragraph, refer to 19.203(b). Each acquisition of supplies or services that has an anticipated dollar value exceeding \$3,000 (\$15,000 for acquisitions as described in 13.201(g)(1)), but not over \$150,000, (\$300,000 for acquisitions described in paragraph (I) of the Simplified Acquisition Threshold definition at 2.101), is automatically reserved exclusively for small business concerns and shall be set aside for small business unless the contracting officer determines there is not a reasonable expectation of obtaining offers from two or more responsible small business concerns that are competitive in terms of market prices, quality, and delivery. **If** the contracting officer does not proceed with the small business set-aside and purchases on an unrestricted basis, the contracting officer shall include in the contract file the reason for this unrestricted purchase. If the contracting officer receives only one acceptable offer from a responsible small business concern in response to a set-aside, the contracting officer should make an award to that firm. If the contracting officer receives no acceptable offers from responsible small business concerns, the set-aside shall be withdrawn and the requirement, if still valid, shall be resolicited on an unrestricted basis. The small business reservation does not preclude the award of a contract as described in 19.203.



15 U.S.C. § 644 (emphasis added). Both the FAR and SBA have codified this statutory mandate in regulations. SBA's regulations state the following:

*(f) Contracting Among Small Business Programs.*

*(1) Acquisitions Valued At or Below \$100,000/Simplified Acquisition Threshold*

The contracting officer shall set aside any acquisition with an anticipated dollar value exceeding \$3,000 (\$15,000 for acquisitions as described in the Federal Acquisition Regulation (FAR) at 48 CFR 13.201(g)(1)) but valued below \$100,000 (\$250,000 for acquisitions described in paragraph (1) of the Simplified Acquisition Threshold definition in the FAR at 48 CFR 2.101) for small business concerns when there is a reasonable expectation that offers will be obtained from at least two small business concerns that are competitive in terms of quality and delivery and award will be made at fair market prices. This requirement does not preclude a contracting officer from setting aside a contract under the 8(a) BD, HUBZone, Service Disabled Veteran Owned (SDVO), or WOSB programs.

13 C.F.R. § 125.2 (emphasis added).

There is nothing in the Small Business Act that provides for a statutory exception of this automatic reservation for small businesses for acquisitions conducted using the GSA Schedule or reverse auctions. Likewise, there is nothing SBA's regulations that provide for an exception of this automatic reservation for small businesses for acquisitions conducted using the GSA Schedule or reverse auctions.

We are aware that the GAO has stated in numerous rulings that FAR § 8.404(a)(1) exempts the application of FAR part 19, concerning SBA's small business programs, from blanket purchase agreements (BPAs) or orders placed against GSA's Schedule contracts. See Global Analytic, *supra*; Millennium Data Systems, Inc., B-292357.2, March 12, 2004, 2004 CPD 48. However, those protests concerned acquisitions valued above the simplified acquisition threshold and therefore, we believe were premised on the fact that small business set asides are not mandated specifically by statute for acquisitions valued above \$100,000.

As a result, this protest differs from the above precedent established by GAO. The SBA believes that MICC was required to set aside this acquisition for small businesses as mandated by the Small Business Act, 15 U.S.C. § 6440), the SBA's regulations and the FAR. Specifically, the FAR states that:

(d) Small business set asides have priority over acquisitions using full and open competition. See requirements for establishing a small business set-aside at subpart 19.5.

FAR § 19.203(d). According to the FAR, "BPAs [Blanket Purchase Agreements] and orders placed against a MAS, using the procedures in this subpart, are considered to be issued using full and open competition (see 6.102(d)(3))." FAR § 8.404(a). According to the FAR, then, small business set-asides below the simplified acquisition threshold have priority over BPAs and orders placed against the Multiple Award Schedule.



Further, we believe MICC was required to set-aside this acquisition for small businesses in light of the precedent established by GAO in the following two rulings: Mission Critical Solutions, B-401057 (May 4, 2009) and Aldevra, B-405271, B-405524, Oct. 1, 2011. In Aldevra, GAO held that the U.S. Department of Veterans Affairs (VA) violated statutory and regulatory requirements by purchasing goods through the GSA Schedule rather than competing the purchases among eligible service-disabled veteran-owned small businesses (SDVOSBs). GAO based its decision on the language in the Veterans Benefits, Health Care, and Information Technology Act of 2006, Public Law 109-461, §§ 502-503, 38 U.S.C. §§ 8127-8128 (2006), which mandates that the VA "shall award contracts" for goods and services through competitions set aside for veteran-owned small businesses or SDVOSBs whenever there is a reasonable expectation that two or more responsible veteran-owned small businesses or SDVOSBs will submit offers at fair and reasonable prices.

Likewise, in Mission Critical Solutions, the GAO ruled that the statutory language set forth in the Small Business Act as it relates to the Historically Underutilized Business Zone (HUBZone) program provided a priority for HUBZone small business concerns over all other small business programs, including specifically the 8(a) Business Development (BD) program. GAO based its decision on the language in the Small Business Act, 15 U.S.C. §657a, in effect at that time which mandated that "notwithstanding any other provision of law," "a contract opportunity shall be awarded pursuant to this section on the basis of competition restricted to qualified HUBZone small business concerns if the contracting officer has a reasonable expectation that not less than 2 qualified HUBZone small business concerns will submit offers and that the award can be made at a fair market price."<sup>2</sup> GAO did not base its decision on SBA's regulations addressing the issue, which specifically authorized parity among SBA's programs instead of giving priority to the HUBZone program. Rather, GAO looked only at the plain language of the statute, ruling, in effect, that the "shall" language of the statute trumped any regulatory language to the contrary.

On appeal of the GAO decision in Mission Critical Solutions, the court held that the Small Business Act "clearly" requires that any contract opportunity "shall be awarded" to a HUBZone small business concern if two or more such concerns are available to perform the contract and if the award can be made at a fair price. See Mission Critical Solutions v. United States, 91 Fed.Cl. 386, 410 (2010).

In light of the precedent set by GAO and the courts, we believe that the statutory language "shall be reserved exclusively for small business concerns" set forth in 15 U.S.C. § 6440) is clear and unambiguous, and there is no discretion to interpret the statutory requirement as anything other than mandatory. As GAO has ruled in Mission Critical Solutions and Aldevra, the "shall" statutory language has specific meaning.

In sum, according to statute and regulations, small business set asides are mandatory for acquisitions valued from \$3,000 to \$150,000 and take priority over GSA Schedule contracts, although a contracting officer can set-aside an order for small businesses. This interpretation is consistent with GAO's own case law.

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<sup>2</sup> We note that this provision of the Small Business Act has since been amended.

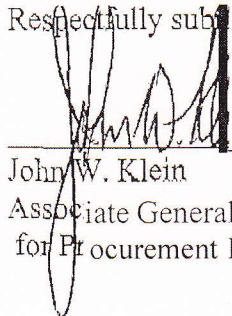
Finally, we note that we also believe that FitNet has standing for this protest as an interested party. FitNet has argued that MICC was required to set-aside the acquisition for small business concerns, as opposed to using FedBid.com for a reverse auction and GSA Schedule holders thereby avoiding the mandatory Small Business Act requirements. As a result, FitNet is as "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract." 31 U.S.C. § 3551(2)(a). Similar to GAO's ruling in LBM, Inc., B-290682, Sept. 18, 2002, 2002 CPD ¶ 157, FitNet is not challenging the proposed award of a task order under an existing indefinite delivery/indefinite quantity contract (IDIQ). Rather, FitNet is challenging the agency's acquisition planning in transferring the requirement to the IDIQ contract without first considering the Small Business Act and implementing regulations.<sup>3</sup>

As the GAO stated in Kingdomware Technologies, B-405727, Dec. 19, 2011: "Where, as here, the protester is challenging the terms of the solicitation, and the remedy sought is the opportunity to compete under a revised solicitation, the protester is an interested party, even if it did not submit a quotation or offer." Here, FitNet is challenging the terms of the solicitation and the remedy sought is the opportunity to compete under a revised solicitation – a solicitation set-aside for small businesses. As such, FitNet is an interested party.

### CONCLUSION

For the foregoing reasons, we believe that MICC was required to set aside the requirement for small businesses. Thank you again for this opportunity to submit a voluntary response to these important issues relating to small businesses and the Small Business Act.

Respectfully submitted,



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The issue of "interested party" was not addressed in the Aldevra decision. A search on GSA's eLibrary does not show that Aldevra is a Schedule Contract holder. <http://www.gsaelibrury.gsa.gov/ElibMain/home.go>. As such, it appears that the same rationale that afforded Aldevra standing to challenge the VA's acquisition strategy in that protest applies equally to FitNet in this protest.



cc (by facsimile or e-mail):

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